BITROMAX CORPORATION SDN BHD

v.

AMIL SALLEH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[ORIGINATING SUMMONS NO: S3-24-2190-2003]
9 MARCH 2004

CIVIL PROCEDURE: *Summary possession of land - Application for - Whether 1st defendant entered and occupied land with licence or consent of plaintiff's predecessors in title - Whether plaintiff could bring proceedings under O. 89 Rules of the High Court 1980 - Rules of the High Court 1980, O. 89 r. 1*

WORDS & PHRASES: *"… without … licence or consent … any predecessor in title of his …" - Rules of the High Court 1980, O. 89 r. 1*

This was an application *via* originating summons by the plaintiff under O. 89 of the Rules of the High Court 1980 ('the RHC') for the recovery of possession of certain land ('the premises') from the 1st defendant. The 2nd defendant, the registered owner of the premises, had let out the premises to one TNB Kekal. TNB Kekal sublet the premises to the plaintiff ('the sub-tenancy'), and by virtue of a tripartite agreement between TNB Kekal, the plaintiff and the 3rd defendant (a wholly owned subsidiary of the 2nd defendant), the rights and obligations of TNB Kekal were novated to the 3rd defendant. The 3rd defendant terminated the sub-tenancy and granted the 1st defendant the right to manage and maintain the premises. The 1st defendant went into occupation of the premises; hence, the present application.

Held (dismissing the application):

[1] The words "… without … licence or consent … of any predecessor in title of his …" in O. 89 r. 1 of the RHC provides that proceedings under O. 89 of the RHC cannot be brought by a person who claims possession of land against a person who enters or occupies that land, if such person enters or occupies with the licence or consent of the predecessor in title of the person who claims possession. In the present case, the 3rd defendant *vis-à-vis* the plaintiff was a predecessor in title since it was the 3rd defendant who sublet the premises to the plaintiff. The 2nd defendant was

also a predecessor in title as it was the registered owner of the premises. In view of the affidavits of the 2nd and 3rd defendants authorising the 1st defendant to enter and occupy the premises, the 2nd and 3rd defendants, as the predecessors in title of the plaintiff, had given licence or consent to the 1st defendant to enter and occupy the premises. Therefore, the plaintiff could not invoke O. 89 of the RHC against the 1st defendant. The plaintiff, if aggrieved by the 1st defendant's entry or occupation of the premises, should have taken a writ action against him. (pp 18 e-h & 19 a-b)

Legislation referred to:

Rules of the High Court 1980, O. 89 r. 1

For the plaintiff - Lee Lim Huat; M/s LH Lee & Co
For the 1st defendant - Mohd Harris; M/s Mohd Harris Mohan & Partners
For the 2nd & 3rd defendants - Khairuzzaman Muhammad (Raja Saidatul Raja Lope); M/s Zul Rafiq & Partners

Reported by Suresh Nathan

JUDGMENT

Hishamudin Yunus J:

This originating summons is an application by the plaintiff under O. 89 of the Rules of the High Court 1980 ('the RHC') for the recovery of possession of land.

I have dismissed the application with costs.

The land in question (hereinafter referred to as 'the premises') was registered in the name of the 2nd defendant, namely, Tenaga Nasional Berhad.

By an agreement dated 4 February 2000 entered into between the 2nd defendant and a company known as TNB Kekal Sdn Bhd (hereinafter referred to as 'TNB Kekal'), the 2nd defendant let out the premises to TNB Kekal.

By an agreement, also dated 4 February 2000, entered into between TNB Kekal and the plaintiff, the said premises was sublet to the plaintiff for a period of three years commencing from 1 September 1999 (hereinafter referred to as the 'sub-tenancy').

By a tripartite agreement dated 1 April 2002 between:

(a) TNB Kekal;

(b) the plaintiff; and

(c) the 3rd defendant, TNB Properties Sdn Bhd, a wholly owned subsidiary of the 2nd defendant, the rights and obligations of TNB Kekal under the sub-tenancy were novated to the 3rd defendant.

By an agreement dated 2 September 2002, the tenure of the sub-tenancy was extended for another three years from 5 January 2003 until 5 January 2006.

By a letter dated 13 November 2002 (hereinafter referred to as the 'termination notice'), the 3rd defendant terminated the sub-tenancy. The termination letter gave the plaintiff a three-month's notice as stipulated by the sub-tenancy agreement. The termination is based on cl. 8(f) of the sub-tenancy agreement which states:

> 8 (f) Mana-mana pihak mempunyai hak untuk menamatkan Perjanjian ini pada bila-bila masa selain dari penamatan di bawah klausa 8(d), 9(e) dengan memberi tiga (3) bulan notis secara bertulis kepada pihak yang lain dengan syarat jika notis penamatan dikeluarkan oleh TNBK sebelum tamat tempoh penyewaan dalam perjanjian sewa ini, maka TNBK hendaklah membayar kos kerja-kerja ubahsuai yang dilakukan oleh penyewa secara prorate terhadap baki tempoh penyewaan tersebut. Selepas notis itu tamat maka Perjanjian ini dan segala yang terkandung di dalamnya akan tamat dan batal tetapi tanpa prasangka kepada apa-apa tuntutan oleh mana-mana pihak terhadap pihak yang lain berhubung dengan pemecahan atau pelanggaran yang terdahulu terhadap mana-mana waad atau syarat dan TNBK hendaklah selepas itu memulangkan kepada Penyewa semua deposit tanpa apa-apa bayaran faedah dikenakan bagi mana-mana tempoh selepas tarikh penamatan tersebut.

By a letter dated 17 February 2003, the 3rd defendant granted the 1st defendant the right to manage and maintain the premises.

The 2nd and 3rd defendants have also averred in their affidavit that they have given their consent to the 1st defendant to enter the premises for the purpose of managing and maintaining the same.

The plaintiff disputes the validity of the termination notice, and so on 27 February 2003 it filed a suit in K.L. High Court Civil 7 (hereinafter referred to as the 'S7' suit) against the 3rd defendant (as the 1st defendant in that suit) and an entity known as 'Perniagaan Sajak' (as the 2nd defendant). The suit against Perniagaan Sajak in the S7 suit is in reality a suit against the 1st defendant in the present case.

The plaintiff thereafter in the S7 suit made an interlocutory application for an interim injunction against the 1st and 3rd defendants to restrain them from entering the premises. The application was, however, dismissed with costs.

By a letter dated 27 August 2003, the 3rd defendant extended the three-month period under the termination notice until 30 September 2003; and requested the plaintiff to hand over possession of the premises on 1 October 2003.

On 28 April 2003, on the request of the plaintiff, a meeting was held at the office of the 3rd defendant between the plaintiff, the 1st and the 3rd defendant, and it was agreed that the plaintiff was allowed to remain in possession of the property until 30 September 2003.

The 1st defendant went into occupation of the premises only with effect from 1 October 2003.

Quite soon thereafter, on 12 November 2003, the plaintiff filed the present originating summons for recovery of possession of the premises from the 1st defendant.

I have dismissed the present application with costs.

I have dismissed this originating summons purely on procedural grounds. Order 89 r. 1 of the RHC provides:

> **1. Proceedings to be brought by originating summons.**
>
> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons with the provisions of this Order.

In my judgment, the words:

> without .. licence or consent …of any predecessor in title of his

in the above rule, means that an O. 89 proceedings cannot be brought by a person who claims possession of land against a person who enters or occupies that land if such person enters or occupies with the licence or consent of the predecessor in title of the person who claims possession. In the present case, the 3rd defendant *vis-à-vis* the plaintiff is a predecessor in title since it is the 3rd defendant who sublets the premises to the plaintiff – and this fact is not disputed. The 2nd defendant is also a predecessor in title as it is also not disputed that it is the registered owner of the premises. In my opinion, in view of the affidavits of the 2nd and 3rd defendants authorizing the 1st defendant

to enter and occupy the premises, this means the 2nd and 3rd defendants, as the predecessors in title of the plaintiff, have given consent or a licence to the 1st defendant to enter and occupy the premises. Therefore the plaintiff cannot invoke O. 89 against the 1st defendant. The plaintiff, if aggrieved by the 1st defendant's entry or occupation of the premises, should have taken a writ action against him.

[Application dismissed with costs]